

# EXHIBIT 5

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE

-----x

L.E., by his next friends,  
And parents \*

Plaintiff \*

V. \*

BILL LEE, in his official \*

Capacity as Governor of \*

Tennessee; PENNY SCHWINN, \*

In her official capacity as \*

The Tennessee Education \*

Commissioner; TENNESSEE \*

STATE BOARD OF EDUCATION; \*

SARA HEYBURN MORRISON in \*

Her official capacity as \*

The executive Director of \*

The Tennessee State Board \*

Of Education; NICK DARNELL \*

MIKE EDWARDS ROBERT EBY \*

GORDON FERGUSON, ELISSA, \*

KIM LILLIAN HARTGROVE, \*

NATE MORROW, LARRY JENSEN \*

DARRELL COBBINS, and EMILY \*

HOUSE, the individual \*

Members of the Tennessee \*

State Board of Education, \*

In their official \*

Capacities; KNOX COUNTY \*

BOARD OF EDUCATION a/k/a \*

KNOX COUNTY SCHOOLS a/k/a \*

KNOX COUNTY SCHOOL \*

DISTRICT; ROBERT M. "BOB" \*

THOMAS, in his Official \*

Capacity as Director of \*

Knox County Schools, \*

Defendants. \*

-----x

DEPOSITION OF PENNY SCHWINN, COMMISSIONER  
APPEARING REMOTELY FROM  
KNOXVILLE, TENNESSEE

August 3, 2022

10:30 a.m.

REPORTED BY:

Dawn L. Halcisak, CLR

APPEARING REMOTELY FROM CRISFIELD, MARYLAND

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1 not to answer, however, you still do need to  
2 answer.

3 Do you understand that?

4 A. Yes.

5 Q. Okay. And at the beginning of the  
6 deposition, the court reporter administered an  
7 oath. It is the same oath you would take as if  
8 you were testifying in a courtroom. You must  
9 testify truthfully and not leave anything out.

10 Is there any reason you can't testify  
11 truthfully today?

12 A. No.

13 Q. Okay. And if you recall additional  
14 information relevant to any of my previous  
15 questions at a later point in the deposition, I  
16 ask that you let me know that, and we can go  
17 over it.

18 A. Yes.

19 Q. Okay. And lastly, I just want to go  
20 over some shorthand terms that I'm going to use  
21 today, just to make sure that we're all on the  
22 same page.



1           When I say "state board," I'm referring  
2       to the Tennessee State Board of Education.

3           When I say "SB228," I'm referring to  
4       Senate Bill 228, the law at issue in this case  
5       and as codified into Tennessee's annotated code,  
6       Section 49-6-310.

7           A.     Yes.

8           Q.     When I say "legislative branch," I'm  
9       referring to the Tennessee State Legislature.

10          A.     Yes.

11          Q.     When I say "transgender," I'm referring  
12       to someone whose gender identity does not match  
13       their sex assigned at birth.

14          A.     Yes.

15          Q.     When is say "cisgender," I'm referring  
16       to someone whose identity matches their sex  
17       assigned at birth, okay?

18          A.     Yes. I understand.

19          Q.     And when I say "L.E.," I'm referring to  
20       the Plaintiff in this case.

21          A.     Yes.

22          Q.     Okay. Great. Do you have any

1 A. Yes.

2 Q. Okay. And could you describe those?

3 A. I have participated in fellowships, and  
4 in those fellowship -- the content of delivery  
5 of those fellowships, we would have similar  
6 conversations.

7 Q. And anything else?

8 A. No.

9 Q. Okay. And so how are you liking being  
10 commissioner?

11 A. I think it is a very, very big job, and  
12 I love when we get to see impacts for kids that  
13 help theme be successful in their live.

14 Q. Okay. And so can you describe to me  
15 the responsibility of the Tennessee Department  
16 of Education, in general?

17 A. So the Tennessee Department of  
18 Education is part of the executive branch. We  
19 are one of -- there are multiple departments  
20 that oversee education in the state. We, I  
21 think, are the largest of those. We are  
22 specifically tasked with implementation.

1           So when a law is passed, unless directed  
2 otherwise, the department of education is the  
3 education arm. But primary responsibility in  
4 overseeing monitoring the 147 districts, or LEAs  
5 in the state.

6           Q.    Okay. You said multiple department are  
7 in charge of education in Tennessee, and the  
8 department of education is the implementation  
9 arm.

10           What are the other departments, and  
11 what are their functions?

12           A.    So there are several departments or  
13 commissions. One is the State Board of  
14 Education, primarily responsible for policy  
15 development.

16           Another is the Tennessee Charter School  
17 Commission, which is responsible for -- it is  
18 also an LEA in the state, but is responsible for,  
19 kind of, the appeals and authorization of public  
20 of charter schools.

21           And then the other, kind of, larger ones  
22 that is often dealt with is the textbook

1 commission, that is a commission that  
2 specifically oversees the state-approved list for  
3 instructional materials in public schools.

4 Q. Okay. And that's all of the  
5 departments that --

6 A. There were --

7 Q. -- that you're speaking about?

8 A. Those are the ones I'm speaking about.  
9 You'll have some smaller agencies that also  
10 impact education, like energy-efficient schools.  
11 But those are the four that are the primary,  
12 from a policy perspective that have roles and  
13 responsibilities.

14 Q. And of those ancillary ones that have,  
15 you know -- that have any kind of dealings  
16 around anything related to SB228?

17 A. We do not oversee sports in the  
18 department of education. That is a different  
19 completely separate.

20 Q. And what organization is that?

21 A. TSSAA.

22 Q. Okay. And is the Tennessee Department

1 of Education a government entity?

2 A. Yes.

3 Q. And does the department of education  
4 receive federal funding?

5 A. Yes.

6 Q. Okay. What kind of federal funding?

7 A. We receive traditional grants, such as  
8 title 1, title 2, title 3, Perkins, IVEA, et  
9 cetera.

10 The second is federal relief funding.  
11 And the third would be discretionary grants that  
12 we may apply for and be awarded.

13 Q. And how are those pots of money -- I  
14 mean, I don't know if they're divided based on  
15 where they originate from, or how they  
16 originated, but how is that administrator in the  
17 Tennessee Department of Education?

18 A. So they'll all have different  
19 administrations based on the rules supplied by  
20 the U.S. Department of Administration or other  
21 entities.

22 So we look at the rules that are

1 promulgated at the federal level, and then we  
2 comply with the way it should be disbursed.

3 So title 1, for example, has a number of  
4 different components to it, but it is  
5 specifically to economically disadvantaged.

6 And so we will comply with whatever  
7 rules or policies are promulgated at the federal  
8 level.

9 Q. Okay. And what role do you play in the  
10 administrative -- funding generally? Is it more  
11 are you in an overseeing role or directly  
12 involved?

13 A. I'm not directly involved. My role is  
14 signatory, as the agent overseeing the  
15 department of education. We have a different --  
16 under me, one of the our departments is federal  
17 programs. So the federal programs office  
18 receives the grants, federal funding monitors  
19 that. It's through what's called a "G5 system."  
20 So they will do all of the signatures, et  
21 cetera, with delegate authority from me.

22 Q. Okay. And is it fair to say that all

1 the government funding that you described is  
2 administered by the federal programs division,  
3 in the department of education?

4 A. The -- no. The grants, the  
5 discretionary grants will usually be a  
6 partnership between the federal programs office  
7 who is the responsible party, and then the  
8 actual program office, in the department, who  
9 applied for and was awarded the grant.

10 Q. Okay. Can you give me an example of a  
11 program office?

12 A. Charter schools. So the Public Charter  
13 School Grant, which is an open right now.  
14 Should we apply for that grant, the office of  
15 choice will be responsible for administering the  
16 programmatic elements, our federal program  
17 office is responsible for receiving, kind of,  
18 that official paperwork related to the financial  
19 management of that.

20 Q. Okay. Does the department of education  
21 have to comply with federal law?

22 A. Yes.

1 Q. Title 9 of the Education Amendment?

2 A. If we sign -- we have to sign  
3 assurances. And so if we receive funding and we  
4 sign papers for those assurance, we are saying  
5 that we will comply with those assurances.

6 Q. Okay. And so specifically, does the  
7 Tennessee Department of Education have to comply  
8 with title 9?

9 A. Yes. Title 9 is law that we must  
10 comply with federal law.

11 Q. Okay. And your understanding is that  
12 it is law?

13 A. Yes. It is title 9.

14 Q. Okay. And does the Tennessee  
15 Department of Education have to comply with  
16 state law?

17 A. Yes.

18 Q. And does the Tennessee Department of  
19 Education have to comply with SB228?

20 A. Yes. Any law that is passed by the  
21 general assembly and signed into law, we are  
22 legally required implement.



1 Q. Okay. And so we talked a little bit  
2 about the overall, sort of, responsibilities of  
3 the department of education. But what are your  
4 responsibilities, as commissioner?

5 A. As commissioner, I oversee all of the  
6 employees in the department of education, and  
7 their various work streams. I'm also  
8 responsible, of course, as an appointee of the  
9 governor to work directly with the  
10 administration.

11 And then the third component would be, I  
12 work with the general assembly, in terms of -- as  
13 they are deciding which laws to pass, and then  
14 pass those laws. I am -- unless delegated -- the  
15 primarily agent of this department to testify,  
16 when request, on any law related to education.

17 MS. BROWN: Okay. Give me one second,  
18 if you will.

19 (Brief pause.)

20 BY MS. BROWN:

21 Q. Okay. And so just to clarify, you said  
22 that as the commissioner, you sometimes work

1 directly with the administration; meaning, the  
2 governor's office?

3 A. Yes.

4 Q. Around education, and law, and policy?

5 A. Yes.

6 Q. Okay. And you also said you are the  
7 designee who works with the general assembly, if  
8 asked, or required?

9 A. Yes.

10 Q. Okay. Okay. So let me ask you some  
11 specific duties.

12 So, again -- so you're responsible for  
13 the implementation of laws and policies by the  
14 general assembly and the State Board of  
15 Education?

16 A. Yes.

17 Q. Okay.

18 "The commissioner shall attend all  
19 meetings of the State Board of  
20 Education and may speak at the meetings  
21 and may make recommendations. Any  
22 recommendations made by the

1           Q.     Okay.  So, to be clear, did the state  
2     board take any implementation measures in 2021,  
3     as related to SB228 -- I'm sorry, did I say  
4     "state board."  I meant department of education.

5                     Did the department of education take  
6     any implementation measures, in 2021, as related  
7     to SB228?

8           A.     Not that I can -- not that I'm aware  
9     of, by memory.

10          Q.     Okay.  And so when a new law is passed  
11     who, in the department of education, assesses  
12     what the department of education actually needs  
13     to do, in terms of responsibility and  
14     compliance?

15          A.     The office of the general counsel and  
16     policy and legislative affairs teams.

17          Q.     And do they make a report to you?

18          A.     No.

19          Q.     Okay.  And do you have any oversight of  
20     their assessment?

21          A.     I -- typically, cabinet -- our cabinet  
22     prioritizes major legislation that will require

1 cross-divisional activities. And so on  
2 a selection of legislation, I will be more  
3 directly participatory.

4 As a note, we had over 70 bills passed  
5 last session. So we typically do what we would  
6 can call "major pieces of legislation." And, you  
7 know, that is complicated implementation or  
8 high-dollar values. But otherwise, regular  
9 implementation is delegated to those two teams.

10 Q. Okay. So for -- so what about SB228;  
11 was it just the pure delegation you had no  
12 involvement as they made their assessment, or  
13 were you involved, as you described, because of  
14 some of those other factors?

15 A. It was deleted because it did not  
16 have -- it was not involving high-dollar values  
17 and it was not a complicated implementation, in  
18 terms of what the department's responsibilities  
19 were.

20 Q. And as it stands now, what's your  
21 understanding of the department's  
22 responsibilities and obligations, in relation to

1 SB228?

2 A. We are responsible for implementing  
3 laws that are passed. And so if there was an  
4 issue that arose to us, then our office of  
5 general counsel, as with any laws, is required  
6 to decide whether or not to investigate. But  
7 the -- the actual implementation of the law  
8 is -- is at the local level, or those who  
9 oversee districts directly.

10 The only exception to that would be the  
11 department's role in overseeing a small number of  
12 school districts, in which policies would need to  
13 reflect the laws that are passed.

14 Q. Okay. And so I want to make sure -- I  
15 don't want to mischaracterized it.

16 So I'm just going to ask: Based on  
17 what you just said, am I understanding it  
18 correctly that you're saying that the department  
19 of education has no role in the actual policy  
20 developed by the L- -- the local -- LEAs? Is  
21 that the acronym?

22 A. Yeah.

1 Q. Okay.

2 A. Local education agencies are  
3 responsible for their policies. We do not --  
4 and their local boards provide legal counsel.

5 The exception to that is that we do  
6 oversee some LEAs, in which case we operate as  
7 the LEA. And so for those LEAs, we are  
8 responsible for developing policies in alignment  
9 with any law passed.

10 Q. And who is responsible for making sure  
11 they actually develop policies?

12 A. Office of general -- oh, excuse me.  
13 I'm sorry.

14 MS. BERGMAYER: Excuse me.

15 I object to form.

16 THE WITNESS: The office of the general  
17 counsel and the policy and legislative affairs  
18 team. And then, we have an assistant  
19 commissioner, who is over what we call our  
20 "state's special schools." And so those are  
21 school districts that the department directly  
22 manages.

1           Q.     Okay.  And are there any policies  
2     you're aware of, right now, that refer their  
3     complaints to the department of education,  
4     outside of the ones that you have direct  
5     authority over?

6           A.     I'm not aware of any, no.

7                   MS. BERGMEYER:  Okay.  Okay.  So I'm  
8     heading -- I'm hitting another section.  So this  
9     is sort of a good of sections of questions that  
10    I realized that we're past the time.  We have 13  
11    minutes.

12                   Okay.  I'll start anyway.  I think I  
13    can -- I think can further cut it off.

14   BY MS. BROWN:

15           Q.     So can you describe for me the  
16    relationship between -- again in general,  
17    between the department of education and the  
18    state board?

19                   I understand that, again, the state  
20    board is the policy and rule-making, sort of,  
21    arm, and you're the implementing arm, but  
22    anything else about that relationship?

1 A. No.

2 Q. And you testified that you're required  
3 to follow state board policy that's passed?

4 A. Yes.

5 Q. And is the state board a government  
6 entity?

7 A. Yes.

8 Q. And does the state board receive  
9 federal financial assistance?

10 A. I don't know.

11 Q. Okay. You don't know.

12 Any policies or programs created by the  
13 state board that you're aware of that receive  
14 federal funds from the department of education?

15 A. I don't know of any federal funds  
16 that's we supply to the state board of  
17 education. But I can't speak to their  
18 relationship with the federal government or any  
19 of their financiers.

20 Q. Okay. Does the department of education  
21 make reporting -- or do any reporting to state  
22 board about its federal financial, or federal



1           A.     I do.

2           Q.     Okay. Okay. So if you refresh it, you  
3 should see an exhibit in the marked folder now.  
4 Let me know when you have that exhibit open.

5           A.     Okay. I'll refresh now.

6                   I see Exhibit A.

7                   (SCHWINN Exhibit No. A marked for  
8 identification and attached to the transcript.)

9 BY MS. BROWN:

10          Q.     Okay. That's right. Okay.

11                 So I'm showing you what I've marked as  
12 Plaintiff's Exhibit A. So if you would just  
13 take a moment to read this over, and then once  
14 you've read it, you know -- I think you can  
15 read -- you can stop at the last letter. I  
16 think it's "F," perhaps -- and then just let me  
17 know verbally that you've completed reading it.

18          A.     Okay.

19                   (Brief pause.)

20                 THE WITNESS: Okay. I've completed  
21 reading it through "F."  
22

1 BY MS. BROWN:

2 Q. Great. Thanks. And just to confirm,  
3 remember that you're still under oath, right?  
4 So everything this morning is still in effect.

5 A. Yes, ma'am.

6 Q. Thank you. Okay.

7 And so, Commissioner Schwinn, what does  
8 this appear to be to you?

9 A. This appears to be a statute effective  
10 July 1, 2022.

11 Q. Okay. And what's the title of this  
12 statute?

13 A. "TCA49-6-310: Determining Student  
14 Gender for Purposes of Participation in  
15 Athletics."

16 Q. Okay. And have you seen this before?

17 A. I have.

18 Q. Okay. And is it the -- what we've been  
19 talking about today -- what I've been referring  
20 to as "SB228"?

21 A. Yes.

22 Q. Okay. And are you familiar with the

1 provision of this law?

2 A. Yes.

3 Q. Okay. Thanks.

4 And so I have more questions related to  
5 that.

6 But briefly, again, Commissioner  
7 Schwinn, when did you -- again, so we're talking  
8 about SB228. And in this question,  
9 specifically, I want to know when did you first  
10 learn about it?

11 And, again, so this is -- if it  
12 was while it was pending, or if it was while it  
13 was enacted -- maybe that's the first question.

14 Did you learn about it after it was  
15 enacted, or did you know about it beforehand?

16 A. I -- we briefly, less than one minute  
17 of conversation, discussed it in those weekly  
18 meetings that I referred to earlier. We did not  
19 discuss the language of the bill or anything in  
20 depth at all, because the department, in the way  
21 that it was proposed, had such a limited role,  
22 it was not something we spent time on.

1           So the first time I actually would have  
2 read the contents of this would have been in the  
3 month of July of 2022.

4           Q.     Okay. And you said in reference to  
5 those "weekly meetings, can you clarify for me  
6 which meetings you're talking about and with  
7 whom?

8           A.     So these would be the weekly meetings  
9 that I would have had with cabinet policy  
10 legislative affairs and counsel to provide  
11 recommendations on bill positions, or to discuss  
12 what the bill positions were that have been  
13 handed down by the governor.

14                 We go over every piece of proposed  
15 legislation. So this would have been in that,  
16 but it would not have been one we spent any time  
17 on.

18           Q.     Okay. And do you remember the earliest  
19 date of that -- or when that meeting occurred --  
20 whenever you had this brief discussion?

21           A.     I do not. But, as a practice, any time  
22 bill is calendared, that would be the first week

1     that we would discuss it.

2           Q.     Okay.  And, again -- so, you know, in  
3     those meetings that you were just talking about,  
4     these cabinet-level meetings to review proposed  
5     legislation, you said part of that is  
6     offering what's know as the "consultation"?

7           A.     So part of that is determining the  
8     consultation that I would give to the governor  
9     and the governor's office, as they consider the  
10    position they'll have on a bill.  Multiple  
11    agencies provide that on many bills.

12          Q.     Okay.  And so the consultations are a  
13    written document or -- you know, what's the  
14    format?

15          A.     Typically, that is something that is  
16    communicated in writing, unless it is an  
17    administration bill, that -- that would be  
18    the -- the standard format would be in writing.

19          Q.     Okay.  And is your consultation grouped  
20    with the other departments or agencies who are  
21    also providing consultation?

22          A.     No.  My consultation -- it's each

1 agency submits that, on a weekly basis, to the  
2 governor's office.

3 Q. Okay. And so would you have submitted  
4 a consultation for SB228?

5 A. Policy and legislative affairs would  
6 submit that consultation on my behalf.

7 Q. Okay. Would you review it before it's  
8 sent out?

9 A. Typically, there are standard weekly  
10 meetings. If I'm not able to be at the meeting,  
11 for a number of issues related to my job, then  
12 cabinet would -- would continue without me. And  
13 then I have that -- policy and legislative  
14 affairs would have that consultation with me  
15 after -- after to let me know what the  
16 recommendations were for my team. And then I  
17 confirm what our recommendations are to the  
18 governor's office, and then that is what is  
19 sent.

20 Q. And. Okay. All right. Thank you.

21 And so having just reviewed this and,  
22 obviously, we're in litigation about this, what

1 does SB228 mean to you?

2 A. So a couple of things. I think if  
3 we're looking specifically at Part A, it is  
4 determining, kind of, for the purposes of  
5 interscholastic activities, participation  
6 eligibility. And it defines what they -- what  
7 the bill or what the law believes eligibility  
8 is.

9 It discusses who is responsible for  
10 promulgating rules and policies.

11 And then, it goes through, kind of, what  
12 the process is, should those policies or rules be  
13 violated or not put into place.

14 Q. Okay. Thank you.

15 And so based on your understanding of  
16 what this law does, would a transgender boy, who  
17 has a female gender marker on his original birth  
18 certificate, be able to play on his -- let's  
19 say, 9th grade soccer team, at a public high  
20 school in Tennessee?

21 A. Can I repeat back to you to make sure  
22 that I understand the -- the --

1 Q. Absolutely.

2 A. So a -- a transgender boy, under this  
3 law, would that transgender boy be able to play  
4 on which soccer team?

5 Q. On the boys' soccer team at his public  
6 9th grade high -- public high school. He's in  
7 the 9th grade, let's say.

8 A. So my understanding of this law is  
9 that, no, that student would be eligible to  
10 participate on that team.

11 MS. BERGMEYER: And I'm going to object  
12 to the form to that question.

13 BY MS. BROWN:

14 Q. And -- okay. And just to drill down on  
15 it: And why specifically wouldn't he be able  
16 to?

17 A. So why specifically, I would -- I would  
18 direct back to section A, and in the law that  
19 was -- or in the bill that was put into law.

20 It -- it says, "Determined by the  
21 student's sex at the time of the student's birth  
22 as indicated on the student's original birth



1 certificate."

2 If the student had a marker female at -  
3 on the original birth certificate, or was  
4 indicated in that way on the original birth  
5 certificate, then my understanding of the law is  
6 that that student would be eligible to  
7 participate on a girls' interscholastic team and  
8 not a boys' interscholastic team, based on the  
9 law or -- yeah, based on the law.

10 Q. And as education commissioner or  
11 commissioner of education, as the highest person  
12 in the department of education -- again, I  
13 understand that there are formal mechanisms for  
14 providing feedback that we've discussed -- but,  
15 again, just based on commissioner and your  
16 experience, in general, as an educator and as an  
17 executive, what did you think about SB228 when  
18 you first learn about it or soon after?

19 MS. BERGMEYER: Object to form.

20 THE WITNESS: So I -- in the four  
21 year -- almost four years I've been in this job,  
22 I do not infuse my personal opinion. I -- I do

1 discrimination in -- in state board policies  
2 that you're aware of?

3 MS. BERGMEYER: Object to form.

4 THE WITNESS: I would defer to counsel.  
5 If there are any, I'm not aware of any. But  
6 that would be a question I would ask my counsel.  
7 BY MS. BROWN:

8 Q. Okay. Commission Schwinn, if you will  
9 go back to the marked exhibits and just to  
10 confirm, yes, open up Exhibit A again? And let  
11 me know verbally when you've done that.

12 A. I have it open.

13 Q. Okay. Again, based upon your review of  
14 the law and understanding of the law, what's the  
15 department of education's role in SB228?

16 A. Our role is what I would read as our  
17 standard role with a number of statutes which  
18 the commissioner of education shall uphold a  
19 portion of the state's education finance funds,  
20 if an LEA fails or refuses to comply.

21 The only difference that I note from  
22 what is, kind of, written blanket within the

1 statute in a number of places is "shall," versus  
2 "may," in Section F.

3 Q. Okay. So you stated withholding funds  
4 for LEAs that are not in compliance with this  
5 law?

6 A. Yes.

7 Q. Okay. What is your understanding of  
8 the state board's role in SB228?

9 A. The state board's role, as outlined  
10 here, is they need to promulgate rules to ensure  
11 compliance and establish a procedure for how the  
12 commissioner and the department are to withhold  
13 funds, pursuant to -- so, essentially, the  
14 process to comply.

15 Q. And so when we say "LEA" -- well, let's  
16 say, what are the role of -- what is your  
17 understanding of the role local school boards,  
18 in relation to SB228?

19 A. Local school boards are the governing  
20 body of the majority of our school districts.  
21 The only exceptions to that would be our states  
22 special schools, the public charter school

1 commission, and that would be it.

2 Q. Okay. And so -- and what do they do in  
3 relationship to SB228 as your -- I mean, your  
4 understanding about it?

5 A. Their responsibility is to enact policy  
6 in compliance with the law.

7 Q. And then, what about individuals  
8 schools; what is their -- what is your  
9 understanding of their role in SB228?

10 A. Individual schools, as with any board  
11 policy, individual schools need to follow the  
12 board policies that have been enacted that are  
13 applicable to them.

14 Q. Okay. So you said it's your  
15 understanding that the -- one of the  
16 responsibilities of the state board, in relation  
17 to SB228, is to promulgate rules for compliance?

18 A. Yes.

19 Q. Okay. The other role that you  
20 identified of the state board, in relation to  
21 SB228, is the process for which you, the  
22 Commissioner, can withhold funds from schools

1     that are not in compliance?

2           A.     Yes.

3           Q.     Okay.  Earlier you testified that in  
4     relation to rule-making, it's usually a joint  
5     effort between the office of general counsel, at  
6     the Tennessee Department of Education, with  
7     someone from legislative and policy, at the  
8     Tennessee Department of Education, and the  
9     office of general counsel, at the state board,  
10    correct?

11          A.     Yes.

12          Q.     Okay.  Would there be someone, from the  
13    Tennessee Department of Education, to work on  
14    promulgating rules for compliance, with SB228?

15          A.     It would be either the office of  
16    general counsel or the policy and legislative  
17    affairs team, if they participated.

18                 But as I testified earlier, I -- the  
19    first time that I was involved in this would have  
20    been this month.  So I don't know what those --  
21    what those conversations may have been.

22          Q.     Okay.  And would someone from the

1 BY MS. BROWN:

2 Q. Okay. Let me ask you this: Is there a  
3 differentiation between pol- -- school board --  
4 or state board policy and state board rules?

5 MS. BERGMEYER: Object to form.

6 THE WITNESS: State board rules have  
7 the affect of law. I would defer to our the  
8 office of general counsel on individual  
9 policies, because it will depend on the policy  
10 and what it references.

11 BY MS. BROWN:

12 Q. Okay. But the department of education  
13 has to ensure that all school board policies are  
14 being complied with by schools, K-12 schools, in  
15 Tennessee -- public schools?

16 A. No, that's not accurate.

17 Q. Okay. Why isn't that accurate?

18 A. We are responsible for monitoring the  
19 implementation of all local board policies.

20 Q. Okay. Are you responsible for  
21 implementing all school board policies related  
22 to SB228?

1 MS. BERGMEYER: Object to form.

2 THE WITNESS: No, we are not  
3 responsible for the implementation of that. No.  
4 BY MS. BROWN:

5 Q. Okay. So do you recall ever meeting  
6 with anyone from the Alvancy York  
7 Agricultural -- or you anyone at the department  
8 of education, has anyone ever met with anyone  
9 from the Alvancy York Agricultural Institute  
10 about SB228?

11 A. Not that I'm aware of.

12 Q. Okay. And have you, or anyone at the  
13 department of education, met with anyone from  
14 the Tennessee School for the Blind, related to  
15 SB228?

16 A. I don't know. Not that I'm aware of.

17 Q. Have you had conversations with anyone?

18 A. No.

19 Q. Okay. And it's the same question:  
20 Have you, or anyone from the department of  
21 education, met with anyone from the Achievement  
22 School District about SB228?

1 Department of Education, correct?

2 A. Yes.

3 Q. Okay. Commissioner Schwinn, you can  
4 now take a look at the next exhibit, which is  
5 marked as Exhibit I.

6 And so, for this one, I would like you  
7 to take a moment to read through this one. And  
8 just, again, verbally let me when you've  
9 completed reading it.

10 (Brief pause.)

11 THE WITNESS: Okay.

12 BY MS. BROWN:

13 Q. And so what does this document appear  
14 to be to you?

15 A. This appears to be a rule related to  
16 the Interscholastic Athletics for the State  
17 Board of Education.

18 Q. Okay. And so this was the rule that  
19 was with the agenda for the July 22, 2022,  
20 meetings of the state board.

21 And so let me ask you: Who was at that  
22 meeting, aside from Ms. Hersey?



1           Are you aware of anyone from the  
2   department of education that was there?

3           A.    I wasn't there, so I can't speak to  
4   that.

5           Q.    Okay. Did you plan not to be there?

6           A.    No.

7           Q.    Have you talked to anyone about this  
8   meeting --

9           A.    No --

10          Q.    -- from the department of education --  
11   sorry.

12                So had you spoken with anyone, in the  
13   department of education, about this meeting?

14          A.    No.

15          Q.    Have you spoken with anyone, at the  
16   school board, about this meaning?

17                MS. BERGMEYER: State board.

18   BY MS. BROWN:

19                MS. BROWN: State board.

20   BY MS. BROWN:

21          Q.    Have you spoken with anyone, at the  
22   state board, about this meeting?

1 A. No.

2 Q. Okay. So looking at the policy --  
3 which, again, is marked as Plaintiff's Exhibit  
4 I -- where did this policy come from -- or I  
5 should say, I take that back. Sorry.

6 Looking at this rule or this proposal,  
7 where did this proposal come from?

8 A. Can you clarify what you mean "where  
9 did it come from?"

10 Q. Who developed this proposal?

11 A. I don't know.

12 Q. Do you know if anyone, from the  
13 department of education, was involved?

14 A. We are typically involved with  
15 rule-making, but I can't speak to this specific  
16 rule.

17 Q. Okay. Do you know why Mrs. Hersey  
18 presented the rule to the -- during the meeting?

19 A. Typically, department staff present  
20 rules, as it relates to K-12 education.

21 Q. Okay. And we're -- what now -- you  
22 know, a little bit over a week, maybe more,

1 since that July 22nd meeting, and has there been  
2 any steps taken, at the department of education,  
3 in relation to this rule or -- rule?

4 A. I don't know. I can't speak to that.

5 Q. And so remind me, what's your  
6 understanding of the status of this rule  
7 proposal?

8 A. My understanding of the status is that  
9 this was heard on reading on July 22, 2022.

10 Q. And what does "Heard on First Reading,"  
11 mean?

12 A. Typically, it goes through two  
13 readings. There's a first reading. The state  
14 board is able to discuss and ask questions.  
15 There's time between the first reading and the  
16 second reading for any revisions that might be  
17 necessary.

18 And then the second reading is typically  
19 second -- sometimes, it's second and final.

20 And sometimes, there's another reading  
21 for final. But it is the first time in which the  
22 state board would have a chance -- an opportunity

1 to review the rule publicly.

2 Q. Okay. And I think I know the answer, I  
3 think you've said it.

4 But, again, are you aware of any future  
5 plans, by the department of education, about  
6 this proposed rule?

7 A. I have not had any discussions about  
8 this rule -- the July -- the July 22nd meeting,  
9 so I don't know.

10 Q. Okay. And so I'll ask: But any future  
11 plans, by the state board, in relation to this  
12 proposed rule?

13 A. I can't speak for the state board.

14 Q. Okay. And so let's take a closer look  
15 at the policy.

16 So, obviously, in the first section of  
17 the definition, you're listed as the  
18 Commissioner, and "department" means the  
19 Tennessee Department of Education.

20 A. Uh-huh. Yes.

21 Q. Okay. And so based on your read of the  
22 Section called "LEA Requirements," what does

1     this proposed rule require LEAs to do?

2           A.     It requires them to be in compliance  
3     with the statute and that they have written  
4     procedures and policies at the local level with  
5     how that shall be enacted on a regular -- on an  
6     annual basis.

7           Q.     And just for clarification -- so in the  
8     definition it says:

9                 "An LEA means a Tennessee local  
10     education agency and has the same  
11     meaning of an NTCA Section 4,9-1-1032."

12           Is a school board an LEA, based on your  
13     understanding of this?

14           A.     No, a school board is not an LEA. A  
15     school board is the governing body over an LEA.

16           Q.     And so it's the individual schools?

17           A.     It is the -- an LEA would be the  
18     collection of schools, while not exactly the  
19     same, but it is what people, oftentimes,  
20     interchange with a school district. So that  
21     would be a central office, the school districts,  
22     the governing board, et cetera.

1 Q. Okay. And so in, again, looking at the  
2 LEA Section 2, do you see the portion where it  
3 mentions an "annual LEA compliance report to the  
4 department"?

5 A. Yes.

6 Q. Okay. And, again, that -- under these  
7 definitions, department -- the department of  
8 education?

9 A. Yes.

10 Q. Okay. Does the department of education  
11 have a compliance report like what -- like  
12 contemplated by this provisions?

13 A. Yes, it is a -- there's an annual  
14 report that essentially certifies that the LEA  
15 is in compliance with state law. It does not go  
16 through each individual law. It's a general  
17 assurance.

18 Q. Okay. Let's move down to "Reviewing  
19 Allegations of Noncompliance."

20 Does compliance fall within your  
21 understanding of enforcement?

22 A. Compliance would be the -- the people

1 responsible for implementation; enforcement  
2 would be a different organization -- would be  
3 different. So I do not see them as the same.

4 Q. Okay. So, again, we've talked about if  
5 the school board is not in compliance, one of  
6 the mechanisms is withholding of school funding.

7 And you don't consider that  
8 enforcement?

9 A. No, they -- they have different  
10 definitions.

11 Q. Okay. And so who, in the first  
12 instance, gets a report of noncompliance under  
13 this proposed rule?

14 A. The district would receive the report  
15 of noncompliance.

16 Q. And so what's the difference between  
17 that and what it says in Section 1, which says,  
18 "Upon receipt of notice of an allegation of  
19 noncompliance"?

20 A. Well, the -- upon receipt of notice of  
21 allegation of noncompliance, that does not  
22 indicate that there is noncompliance. It's just

1     that there is a notice of an allegation.

2           Q.     Okay. And so where there's an  
3     allegation, again, of noncompliance with SB228  
4     who receives that?

5           A.     In -- if we're looking at Section 1,  
6     then this is when the department receives that  
7     notice of an allegation of noncompliance.

8           Q.     Okay. And, again, just to be clear,  
9     based on this proposed rule, what happens next  
10    after you receive this notice -- of an  
11    allegation?

12          A.     The department must or shall initiate a  
13    review of the allegation within 10 calendar  
14    days.

15          Q.     And in that investigation, under this  
16    proposal rule, what does the department of  
17    education have the authority to do?

18          A.     We -- we do a review and we send  
19    written notification to the LEA of that review.  
20    We will also inform the reporting party, which  
21    is the person or persons who provide the notice  
22    of an allegation.



1           And then we have the authority to  
2     request information, or interview as part of an  
3     investigation, if that -- if those are the next  
4     steps that the department determines are  
5     necessary.

6           Q.     Okay. And then what's your  
7     understanding of provision 3, under the same  
8     section?

9           A.     The department has 60 days to have a  
10    determination. There must be a determination  
11    letter that is sent to the LEA. That is where  
12    the allegations arose. It is also sent to the  
13    reporting party.

14           MS. BROWN: Okay. Can you all still  
15    hear me? I had to switch my ear pods. They  
16    just died.

17           THE WITNESS: Yes.

18    BY MS. BROWN:

19           Q.     And her provision 4, what happens with  
20    the LEA, if found to be in noncompliance?

21           A.     If they are found to be in  
22    noncompliance, the letter that we are required

1 to send within 60 days, shall include that  
2 notice that lets them know they're in  
3 noncompliance.

4 It also would require that we provide  
5 corrective action steps that they can move into  
6 compliance -- and a deadline by which they must  
7 to do that.

8 Q. Okay. And so you see the provision  
9 that says "coercive action steps are required  
10 for compliance"?

11 A. Is that under 4?

12 Q. Yes.

13 A. "Corrective action steps"?

14 Q. Oh, sorry. Yeah. You're actually  
15 right, "corrective action steps require for  
16 compliance."

17 A. Okay.

18 Q. Okay.

19 A. Yes.

20 Q. Okay. And then provision 5, what's  
21 your understanding of that?

22 A. If we determine that the LEA does not

1 meet the corrective actions, as outlined in  
2 Section 4, we will send them a letter of  
3 withholding, explain why there's a withholding,  
4 and that withholding will occur, and it will  
5 tell the LEA they have a right to contest our  
6 determination.

7 Q. And as of now, there's no formula for  
8 assessing a withholding, if an LEA was found to  
9 be noncompliance?

10 And there's no -- let's say, so there's  
11 no school board policy assessing a formula  
12 for -- for calculating how much you would  
13 withhold in the event there was noncompliance?

14 A. I'm not aware of any formula that would  
15 do that. No.

16 Q. Okay. And there's no school board rule  
17 on the same issue -- school -- state board --  
18 state board rule -- on the same issue?

19 A. No, I not aware of any state board  
20 rule.

21 Q. Okay. And -- okay. And so under the  
22 section entitled "Early Resolution," you read

1 transgender girl is interested in playing, maybe  
2 golf, participate on that team, are you aware of  
3 any Title 9 implications, in this scenario,  
4 where there's only a boys' sports team?

5 A. No, I would defer to counsel if that  
6 question came to my desk.

7 Q. Okay. And, again, looking at Exhibit  
8 A --

9 A. Uh-huh.

10 Q. -- well, then, so let me start off with  
11 this question. Okay.

12 So would you agree that there are other  
13 benefits to participation in interscholastic  
14 sports, other than winning and the opportunity  
15 for collegiate scholarships?

16 MS. BERGMEYER: Object to form.

17 THE WITNESS: Yes.

18 BY MS. BROWN:

19 Q. Okay. So what are the benefits of  
20 participating in interscholastic sports  
21 generally, in K-12 education?

22 A. Physical --

1 (Whereupon, multiple speakers  
2 simultaneously.)

3 MS. BERGMEYER: Same objection.

4 THE WITNESS: Sorry. I'm sorry.

5 MS. BERGMEYER: It's okay. Objection  
6 for the record.

7 Please continue with your response.

8 THE WITNESS: Physical health,  
9 friendship would be examples.

10 BY MS. BROWN:

11 Q. What about the benefits to mental  
12 health, in participation in interscholastic  
13 sports?

14 A. Yes. That's with all extracurricular  
15 activities.

16 Q. Okay. What about the benefits to  
17 academic performance when students participate  
18 in interscholastic sports?

19 MS. BERGMEYER: Object to form.

20 THE WITNESS: It depends on the  
21 student.

22

1 BY MS. BROWN:

2 Q. Okay. So given these benefits that  
3 we've talked about, do you think that  
4 transgender students would or could receive  
5 these same benefits from participation in  
6 interscholastic sports?

7 MS. BERGMEYER: I object to the form.

8 THE WITNESS: I believe transgender  
9 students would receive the same benefits as any  
10 other students, as it relates to extracurricular  
11 activities.

12 BY MS. BROWN:

13 Q. Okay. Again, in your experience as  
14 Commissioner and your background in education,  
15 do you think higher education, beyond K-12, is  
16 important?

17 A. Yes.

18 Q. Why?

19 A. Statically, students who complete  
20 post-secondary education opportunities are more  
21 likely to have higher income and better health  
22 benefits -- health later in life. That's tied

1 to post-secondary completion, as well as 3rd  
2 grade reading.

3 Q. Okay. Would you agree that some  
4 transgender students may want to go to college?

5 MS. BERGMEYER: Object to form.

6 THE WITNESS: Yes, I believe that is  
7 a -- that is a reasonable statement, yes.

8 BY MS. BROWN:

9 Q. Are you aware of any transgender  
10 students -- any transgender people, I should  
11 say, that participate in collegiate sports?

12 A. Yes.

13 Q. Okay. And who specifically?

14 A. I do not know -- I do not know her  
15 name, but it would be the -- the -- I think the  
16 context that has been publicized quite often,  
17 related to the swim team. I don't know the  
18 school name or the states involved.

19 Q. Okay. Do you think transgender  
20 students may want or need athletic scholarship  
21 opportunities to be able to attend college?

22 MS. BERGMEYER: Object to form.

1           THE WITNESS: I don't have enough  
2 information or expertise to be able to comment  
3 on wants and needs of these students.

4 BY MS. BROWN:

5           Q. Okay. So earlier in your testimony,  
6 you talked about a potential downside to the  
7 participation of transgender students, in K-12  
8 sports, as what I'm going to characterize as  
9 "displacement" of perhaps -- you know, if we're  
10 talking about a transgender girl -- a cisgender  
11 girl from the team, because of an athletic  
12 advantage.

13                   Is that fair to say?

14           A. I think I talked about the benefits and  
15 drawbacks from both perspectives on that issue,  
16 yeah.

17           Q. But -- okay. But that was one of the  
18 drawbacks, as I described it?

19           A. Correct.

20           Q. In Tennessee, K-12 interscholastic  
21 sports, are you aware of any instances of  
22 cisgender girls being displaced by transgender



1 girls?

2 A. No.

3 Q. And in Tennessee, K-12 interscholastic  
4 sports, are you aware of any instances of as  
5 cisgender boys being displaced by transgender  
6 boys?

7 A. No.

8 MS. BROWN: Okay. So we're at 5:27.  
9 So before I proceed with the rest of my  
10 questions -- which I promise are not that  
11 long -- I do want to have a moment to check in  
12 with my team really quickly.

13 (Recessed at 5:28 p.m.)

14 (Reconvened at 5:44 p.m.)

15 BY MS. BROWN:

16 Q. Generally, I understand from your  
17 testimony today that the department of education  
18 isn't really involved in interscholastic policy,  
19 except where necessitated by the law, correct?

20 A. That's correct.

21 Q. Do you, or anyone at the department of  
22 education, collect data related to injuries in

1 interscholastic sports, in K-12 public  
2 education?

3 A. Not that I'm aware of.

4 Q. Okay. Do you know about injuries  
5 generally, in K-12 public education  
6 interscholastic sports, in Tennessee?

7 A. No.

8 Q. Okay. Under SB228, if a transgender  
9 boy, who is known to all his fellow students as  
10 a boy, and treated as a boy, shows up for  
11 tryouts for a girls' sports team, how do you  
12 think that student may be treated?

13 MS. BERGMEYER: I object to the form.

14 THE WITNESS: I -- I don't think I can  
15 speak to generally how a -- how a student would  
16 be treated.

17 BY MS. BROWN:

18 Q. Okay. And so earlier -- again, so just  
19 recapping some of your testimony earlier to make  
20 sure we're on the same page.

21 I asked you if a -- under your current  
22 understanding and read of SB228, a transgender

1 boy, who has a female gender marker on his  
2 original birth certificate, would not be allowed  
3 to play on a boys' interscholastic sports team,  
4 in K-12 -- well, K-12, but -- that's going  
5 through 12th grade, interscholastic teams in  
6 public schools, in Tennessee, correct?

7 A. That's correct.

8 Q. Okay. Under SB228, if a transgender  
9 boy tried out for a boys sports team and was  
10 good enough to make the team, would he be  
11 allowed to join and play on the team?

12 MS. BERGMEYER: Object to form.

13 THE WITNESS: My understanding is he  
14 would -- that student would not be allowed to  
15 participate on that team.

16 BY MS. BROWN:

17 Q. Would the student be allowed to try out  
18 under SB228?

19 MS. BERGMEYER: Object to form.

20 THE WITNESS: The law says  
21 "participation." I would defer to counsel  
22 whether participation is actually playing on the

1 CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

2 I, Dawn L. Halcisak, Court Reporter and  
3 Notary Public in and for the State of Maryland,  
4 the officer before whom the foregoing Remote  
5 Deposition was taken, do hereby certify that the  
6 foregoing transcript is a true and correct  
7 record of the testimony given; that said  
8 testimony was taken by me stenographically and  
9 thereafter reduced to typewriting under my  
10 direction and that I am neither counsel for,  
11 related to, nor employed by any of the parties  
12 to this case and have no interest, financial or  
13 otherwise, in its outcome.

14 IN WITNESS WHEREOF, I have hereunto set  
15 my hand this 22nd day of August, 2022.

16

17

18 My Commission Expires:

19

20



21

NOTARY PUBLIC IN AND FOR THE

22

STATE OF MARYLAND